IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 11, 2001 Session

EVELYN ELAINE TOLLETT v. SHELBY LEE TOLLETT

Direct Appeal from the Circuit Court for Hamilton County
No. 00 D 1228 Hon. Jacqueline E. Schulten, Circuit Judge

FILED JANUARY 28, 2002

No. E2001-01660-COA-R3-CV

Husband sought to set aside a Final Divorce Decree on the grounds of non-compliance with T.C.A. §36-4-103(a). The Trial Court refused. We Affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and WILLIAM H. INMAN, SR. J., joined.

Phillip C. Lawrence, Chattanooga, Tennessee, for Appellant.

Kiff L. Newkirk, Chattanooga, Tennessee, for Appellee.

OPINION

A divorce decree was entered on August 15, 2000, divorcing the husband and wife. On May 23, 2001, husband filed a Motion to Vacate the Final Judgment, which is essentially a collateral attack on the divorce Judgment. He alleged that the Marital Dissolution Agreement failed to recite that he waived the filing of an answer, and also failed to refer specifically to a pending divorce action by docket number or to state the husband was aware that the action would be filed.[1] The Trial Court dismissed the husband's action, and after the husband filed a Notice of Appeal, the

[1]Husband's brief takes issue with the fact that the Marital Dissolution Agreement refers to the divorce action by court and docket number, but said action was not "pending" at the time the Marital Dissolution Agreement was signed, because it had not been filed yet. Husband's counsel conceded at oral argument, however, that it could be inferred from the totality of the circumstances that husband knew that a divorce action was going to be filed soon. Thus, husband's main issue was with the failure of the Agreement to waive the filing of an answer.

wife filed a Motion to Alter or Amend the Final Decree to reflect that the husband was present and testified at the divorce hearing. Over the husband's objection, the Final Decree was amended to reflect that the husband had appeared and testified in court.

The husband insists that the Divorce Decree in this case is void for lack of personal jurisdiction.

Tenn. Code Ann. §36-4-103, states, in pertinent part:

> (2) In lieu of service of process, the defendant may enter into a written notarized marital dissolution agreement with plaintiff that makes specific reference to a pending divorce by a court and docket number, or states that the defendant is aware that one will be filed in this state and that the defendant waives further service and waives filing an answer to the complaint. Such waiver of service shall be valid for a period of one hundred eighty (180) days from the date the last party signs the agreement. The agreement may include the obligation and payment of alimony, in solido or in futuro, to either of the parties, any other provision of the law notwithstanding. The signing of such an agreement shall be in lieu of service of process for the period such waiver is valid and shall constitute a general appearance before the court and answer which shall give the court personal jurisdiction over the defendant, and constitute a default judgment for the purpose of granting a divorce on the grounds of irreconcilable differences.

In this case, husband especially waives service of process in the Marital Dissolution Agreement, and also expressly submitted to the jurisdiction of the court. He did not, however, waive the filing of an answer, and an answer was not filed.

Husband argues that divorce is purely a creature of statute, and thus that the statute must be strictly complied with in order for the decree to be valid. *See Turner v. Bell*, 279 S.W.2d 71 (Tenn. 1955). He reasons that since the Marital Dissolution Agreement does not recite that he waived the filing of an answer, the Decree which the court entered is void. The law makes it clear, however, that judgments will not be considered void unless the record shows that the court who issued the same was without subject matter jurisdiction or personal jurisdiction, or that the decree itself is "wholly outside of the pleadings." *Gentry v. Gentry*, 924 S.W.2d 678 (Tenn. 1996). Thus, mere procedural flaws will not render the decree void. *Id.*; *Hall v. Hall*, 1999 WL 23904 (Tenn. Ct. App. 1999). *Also see: Lewis v. Frances*, 201 WL 219662 (Tenn. Ct. App. March 7, 2001).

The failure of the Marital Dissolution Agreement to contain the statutory language that the husband waived the filing of an answer is analogous to the procedural flaws discussed in *Gentry* and *Hall*, and does not rise to the level of a jurisdictional requirement. Husband signed the Marital Dissolution Agreement and agreed that he wished to make a settlement of his property rights concerning the dissolution of the marriage, and specifically waived service of process, and expressly submitted himself to the court's jurisdiction. Thus, there is no lack of jurisdiction appearing on the face of the record which would render the Decree void, and the husband presents no basis for such

an attack. Procedural irregularities in taking a default judgment is not a basis to void an otherwise valid judgment by collateral attack. We affirm the Trial Court's dismissal of the husband's action to void the Judgment.

The action of the Trial Court in granting the wife's Rule 60 Motion is before this Court, but in view of our ruling is rendered moot.[2] The Judgment of the Trial Court is affirmed and the cause remanded, with the cost of the appeal assessed to Shelby Lee Tollett.

HERSCHEL PICKENS FRANKS, J.

[2]Proper procedure was not followed in the T.R.C.P. Rule 60 Motion. There were no affidavits filed by the wife or her counsel to establish that the husband was present at the hearing, and the Court did not make any finding or even state on the record that the Court remembered the husband being present at the hearing.